

**DEPARTMENT OF HOMELAND SECURITY
BOARD FOR CORRECTION OF MILITARY RECORDS**

Application for the Correction of
the Coast Guard Record of:

BCMR Docket No. 2011-209

XXXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXXX

FINAL DECISION

This proceeding was conducted according to the provisions of section 1552 of title 10 and section 425 of title 14 of the United States Code. The Chair docketed the case on July 18, 2011, upon receipt of the application, and subsequently prepared the final decision as required by 33 C.F.R. § 52.61(c).

This final decision, dated April 19, 2012, is approved and signed by the three duly appointed members who were designated to serve as the Board in this case.

APPLICANT'S REQUEST AND ALLEGATIONS

The applicant asked the Board to correct his record by removing a letter dated December 16, 2001, documenting his first alcohol incident on October 31, 2001. The applicant alleged that the alcohol incident letter was issued under "false pretenses" because it was based on erroneous statements in a February 14, 2002 non-punitive letter of reprimand¹ from the commanding officer (CO) admonishing the applicant for acting in a "reproachable manner through [his] public intoxication and subsequent arrest" on the night in question.. The applicant stated that he "was never arrested or charged by the police on or in relation to any event on the night of 31 October 2001," notwithstanding comments to the contrary in the non-punitive letter of reprimand. The applicant also denied that he made the comment "drink to get drunk" or condoned that practice, as indicated in the non-punitive letter.

The applicant stated that he was passed over for promotion to lieutenant commander (LCDR) by the calendar year (CY) 2011 selection board, and until then, he was unaware that the alcohol incident letter could adversely impact his career. He asserted that removing the alcohol incident letter would ensure that his career is not impacted negatively by a minor error "captured

¹ An administrative letter of censure or reprimand is a corrective measure used in furthering the efficiency of the command. It is not punishment and is not included in the unit files or in any military official record. However, the facts upon which an administrative letter is based may be the basis for adverse marking or comments in the next fitness report of an officer. Article 8.E.4 of the Personnel Manual.

by additional documentation as mentioned in ALCGPSC 041/11.”²] The alcohol incident letter states the following:

Per [the Personnel Manual] your public intoxication on the night of 31 October 2001 has constituted an alcohol incident. You have been counseled on the Coast Guard policy regarding alcohol abuse, which is contained in Chapter 20.B. of [the Personnel Manual]. You underwent an alcohol screening . . . on 28 November 2001. That screening determined that no further intervention or treatment was required.

You are advised that any subsequent alcohol incidents will result in your being processed for separation from the U. S. Coast Guard under Chapter 20.A. of [the Personnel Manual].

As mentioned by the applicant, the CO gave him a non-punitive letter of reprimand on February 14, 2002, that reprimanded him for his conduct on the night of 31 October 2001. The letter of reprimand stated the following:

You behaved in a reproachable manner through your public intoxication and subsequent arrest on that night. This is unacceptable conduct for any Coast Guard member. As a Coast Guard officer, your behavior was even more destructive as you have set an extremely poor example for your subordinates and have jeopardized the inherent trust befitting your rank.

I am extremely concerned about your apparent intention to “drink to get drunk” that evening. I am also concerned that you didn’t consider the amount of alcohol that you consumed that evening to be unusual for anyone. It is your responsibility to always drink responsibly or not drink at all. I strongly encourage you to keep this basic tenet in the forefront of your mind whenever you are considering the consumption of alcohol. I also encourage you to remember that you must always ensure that your actions set a good example for others and that your conduct is always “becoming an officer and a gentleman.”

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This letter is private in nature and will not be included in any official unit files or records. It may not be quoted or appended to your fitness report. The facts upon which it is based, however, may serve as the basis for adverse marks or comments on your next fitness report.

² ALCGPSC 041/11, issued on March 23, 2011, summarized the board season for FY 2011 and emphasized the following about ensign OERs, in pertinent part: “Beginning in [promotion year] PY 2004, ensign OERs were masked from [LCDR] and above selection boards. This policy was enacted to encourage measured risk taking and challenging learning situations without fear of career-ending repercussions. It also allows junior officers to recover from minor mistakes. It is worth pointing out that this policy only applies to OERs, not additional documentation (e.g., PG7’s and memos).”

In support of his application, the applicant submitted a July 6, 2011 letter from the Police Records Supervisor for the City of Virginia Beach which stated that there were no records that matched the applicant's name and social security number for that city only. The Virginia Beach letter included the following disclaimer: "This record does not reflect any juvenile charges. This criminal history check does not include a Nationwide or Statewide search; therefore, this record may be incomplete. Any additional charges in Virginia Beach that are not listed were not prosecuted, found not guilty, or dismissed." The letter advised that for a complete criminal history check and inquiry should be directed to the Virginia State Police and/or the FBI/Criminal Justice Information Division.

VIEWS OF THE COAST GUARD

On October 20, 2011, the Judge Advocate General (JAG) of the Coast Guard submitted an advisory opinion recommending that the Board deny the applicant's request. The JAG argued that the applicant has failed to substantiate an error or injustice regarding his properly documented alcohol incident. The JAG quoted Article 20.A.2.d. of the Personnel Manual which defines "alcohol incident" as "[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice (UCMJ), Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident." The JAG argued in light of this provision, the applicant's claim that the alcohol incident letter should be removed because he was not arrested or charged by the police is without merit because according to Article 20.A.2.d., "the member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident." The JAG further stated the following:

The applicant's submission of his police records check is baseless, irrelevant and non-dispositive in this matter. Moreover, the applicant could have had his criminal record expunged, which would explain the lack thereof. The applicant has failed in his burden to produce evidence which shows the [Coast Guard] committed an error or injustice in its decision to award the applicant with an alcohol incident and to document such in his record. The applicant's request to have his properly documented alcohol incident redacted should be denied.

Attached to the advisory opinion as Enclosure (1) was a memorandum from the Commander, Coast Guard Personnel Service Center (PSC), which the JAG asked the Board to accept as a part of the Coast Guard's advisory opinion. PSC recommended that relief be denied and offered the following:

[T]he applicant's command deemed an alcohol incident had occurred that in some way involved the applicant. This administrative remark serves as the official documentation of the incident. Any investigation, punitive or administrative, is considered subsequent and has no bearing on this document's validity.

The fact that an alcohol incident had occurred that in some way had a connection to the applicant is properly documented and contained in the applicant's record. Any subsequent claim made by the applicant is without merit and does not negate this fact.

APPLICANT'S RESPONSE TO THE VIEWS OF THE COAST GUARD

On November 21, 2011, the Board received the applicant's reply to the views of the Coast Guard. He attached a letter from LCDR V who was an ensign at the time. LCDR V stated that he was assigned to the same cutter as the applicant between approximately May 2001 and June 2003 and that he was with the applicant on the evening of October 31, 2001. LCDR V stated that "[the applicant] was not arrested or charged with public intoxication that evening or at all in connection with the events of that evening. The applicant's reply to the views of the Coast Guard also stated the following:

After being provided the non-punitive letter of reprimand that contained the false accusations stating "my arrest" and "public intoxication" resulted in the alcohol incident, I immediately notified my supervisor of the error. I was told there was nothing I could do about the alcohol incident because it is up to the discretion of the command and the only way to overcome the situation was to put it behind me.

As an ensign with less than six months active duty service, I followed my supervisor's guidance because I was not aware of any other option to correct the injustice. In May 2003, ALCOAST 214/03³] . . . indicated ensign OERs would no longer be viewed at LCDR and above promotions boards beginning with promotion year 2004. After being promoted to lieutenant in May 2005 and having discussed this policy change with my command, I was informed this alcohol incident would no longer impact my career and I did not pursue any corrective action. It was not until I was passed over during the PY 11 LCDR selection board and ALCGPSC 041/11 was released in March 2011 [that] I was made aware that additional documentation received as an ensign was allowed to be viewed despite the policy change in ALCOAST 214/03. This new information prompted me to pursue corrective action by review of the Board for Correction of Military Records.

The alcohol incident memo has continued to negatively impact [my] career and I received a second non-selection for promotion during the PY 2012 LCDR Selection Board. I appreciate your review of the situation and request the Board's approval to remove the alcohol incident memo or determine it should be masked

³ ALCOAST 214/03, issued on May 9, 2003, stated that promotion boards will no longer view any ensign OERs at LCDR and above promotion boards beginning with promotion year 2004. The Commandant stated that he was initiation "the policy to encourage intelligent risk taking without fear of being unduly penalized for minor youthful mistakes and to assist ensigns in adjusting to the Coast Guard culture and the Coast Guard officer corps. There is a significant learning curve during an officers first year and a half of commissioned service, and minor mistakes made during this period should not adversely affect officer late in their careers."

at promotion boards. The alcohol incident was already captured in my ensign OER; therefore, by redacting the associated memo the ruling would ensure the intent of the policy change was upheld without losing the incident being captured in my OER.

APPLICABLE LAW

Personnel Manual (COMDTINST M1000.6A)

Article 20.A.2.d. defines “alcohol incident” as “[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice (UCMJ), Federal, State, or local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident.” This provision further states, “The member must actually consume alcohol for an alcohol incident to have occurred.”

Article 20.B.2.e. states that any member involved in an alcohol incident shall be screened and the results of this alcohol screening shall be recorded and acknowledged on a page 7 entry describing the facts of the incident or risk factors, the results of the screening, the position and organization of the individual conducting the screening, and a statement of the treatment recommended, if any.

Article 20.B.2.g. states that upon a first alcohol incident an officer shall be counseled by letter with a copy PSC-opm and PSC-adm-3. The counseling should include advice on the Coast Guard policy on alcohol abuse and a warning that a subsequent incident will result in their being processed for separation.

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's military record and submissions, the Coast Guard's submissions, and applicable law:

1. The Board has jurisdiction concerning this matter pursuant to section 1552 of title 10 of the United States Code. The application was timely.⁴

2. Article 20.A.2.d. defines “alcohol incident” as “[a]ny behavior, in which alcohol is determined, by the commanding officer, to be a significant or causative factor, that results in the member's loss of ability to perform assigned duties, brings discredit upon the Uniformed Services, or is a violation of the Uniform Code of Military Justice (UCMJ), Federal, State, or

⁴ See, *Detweiler v. Pena*, 38 F.3d 591, 598 (D.C. Cir. 1994) (holding that, under § 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, the BCMR's three-year limitations period under 10 U.S.C. § 1552(b) is tolled during a member's active duty service).

local laws. The member need not be found guilty at court-martial, in a civilian court, or be awarded non-judicial punishment for the behavior to be considered an alcohol incident."

3. The applicant was given an alcohol incident letter dated December 16, 2001, because the CO determined that his public intoxication on the evening of October 31, 2001, constituted an alcohol incident. The applicant argued that based upon the February 14, 2002 non-punitive letter of reprimand, the CO mistakenly believed that the applicant was arrested for public intoxication on the night in question. The applicant stated that he was "never arrested or charged by the police on or in relation to any events on the night of October 31, 2001. The applicant submitted a statement from the Virginia Beach Police Department that it had no record of any arrest for the applicant. The applicant also submitted a statement from LCDR V who stated that he was with the applicant on the evening of October 31, 2001, and that the applicant was "not arrested or charged with public intoxication that evening or at all in connection with events of that evening."

4. For the reasons discussed below, the Board is not persuaded that the alcohol incident letter is erroneous or unjust. In this regard, the Board notes that the alcohol incident letter does not state that the applicant was arrested, as argued by the applicant, but that he was publicly intoxicated. Nor is the Board persuaded that the alcohol incident letter is based upon the non-punitive letter of reprimand. The alcohol incident letter was given to the applicant on December 16, 2001 approximately 2 months before he was given the non-punitive letter of reprimand on February 14, 2002. Any argument that the CO believed that the applicant was arrested due to public intoxication when he issued the alcohol incident letter on December 16, 2001 is speculation, particularly since the document prepared contemporaneously with that date does not mention an arrest.

5. Nor is the Board persuaded that the alcohol incident letter is inconsistent with LCDR V's statement that "[the applicant] was not arrested or charged with public intoxication that evening or at all in connection with the events of that evening." As stated above, the alcohol incident letter does not state that the applicant was arrested or charged with public intoxication. It states that he was publicly intoxicated. It is important to note that LCDR V does not deny that the applicant was intoxicated in public. Also, LCDR V's letter does not vouch for the applicant's conduct for the entire evening because he fails to state how long he was with the applicant on the night in question. Again, the alcohol incident letter states that the applicant was intoxicated in public not that he was arrested or arrested for such intoxication. Therefore, the applicant has not produced sufficient evidence to prove that he was not publicly intoxicated on the evening in question.

6. With regard to the Virginia Beach Police Department letter that they have no records of an arrest for the applicant, the Board would note that the applicant has not established that the cutter was in Virginia Beach, VA on the evening in question. Therefore, if the cutter was not in Virginia Beach on October 31, 2001, there would be no record of such an arrest in that city. The command's address on both the letter of reprimand and the alcohol incident letter is XXXXXXXXXXXXXXXX. In light of the above findings, the applicant has failed to prove that the alcohol incident letter is erroneous.

7. With regard to allegations that the non-punitive letter inaccurately states that the applicant was arrested and publicly intoxicated, the Board notes that there is some evidence supporting the applicant's contention that he was not arrested or at least he was not arrested by the Virginia Beach police. However, because the applicant does not establish that the cutter was in Virginia Beach, VA on the night in question and because the officer who was with the applicant does not state that he was with the applicant the entire evening, the Board finds the evidence insufficient to prove that the applicant was not arrested on the evening of October 31, 2001. Even if the applicant had met his burden of proof, the February 14, 2002 non-punitive letter of reprimand is not in his record because it is a private communication from the CO to the applicant. So, any error that may exist in the non-punitive letter did not prejudice the applicant's record before the selection board.

8. The applicant argued that the alcohol incident letter which he received as an ensign should not have been seen by the LCDR selections boards. In this regard, he stated that he believed until his first non-selection that the alcohol incident letter would be masked pursuant to ALCOAST 214/03 issued on May 9, 2003, which that stated that ensign OERs would not be reviewed by LCDR and above selection boards. However, the applicant points to nothing in that ALCOAST which states that other documentation relating to the conduct of ensigns would be masked from view by the selection board. The alcohol incident letter is not a part of any ensign OER, but is a separate stand alone document. On March 23, 2011, PSC issued ALCGPSC 041/11, in which it summarized the PY 2011 selection board season and emphasized that the policy of masking ensign OERs did not apply to other documents, such as page 7s and memos. Therefore, although the applicant may have assumed that all of his ensign related documents were to be masked before the LCDR selection board, that was not the case and was not stated as such by the Commandant in ALCOAST 214/03. The policy is to mask ensign OERs. Therefore, the availability of the alcohol incident letter for review by the LCDR selection boards was not an error or injustice.

9. Military records are presumed to be correct and the applicant has not produced sufficient evidence to overcome that presumption. Since the applicant has failed to prove an error or injustice in his military record, no basis exists on which to consider removing his failures of selection for promotion to LCDR.

10. Accordingly, the Board finds that the applicant has failed to prove an error or injustice in this case, and relief should be denied.

[ORDER AND SIGNATURES APPEAR ON NEXT PAGE]

ORDER

The application of XXXXXXXXXXXXXXXXXXXXXXXXXXXX, for the correction of his military record is denied.

Anthony C. DeFelice

Megan Gemunder

Patrick B. Kernan